U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 August 2006

In the Matter of

GS,
Claimant

v.

LOFTIS COAL COMPANY,
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-In-Interest

Case No. 2004-BLA-06162

Appearances: GS, Pro Se
For the Claimant

Lois A. Kitts, Esq.
For the Employer

Before: William S. Colwell
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901 *et seq*. The Act and applicable implementing regulations, 20 CFR Parts 718 and 725, provide compensation and other benefits to living coal miners who are totally disabled due to pneumoconiosis and their dependents, and surviving dependents of coal miners whose death was due to pneumoconiosis. The Act and regulations define pneumoconiosis, commonly known as black lung disease, as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. 30 U.S.C. § 902(b); 20 CFR § 718.201. In this case, the Claimant, GS, alleges that he is totally disabled by pneumoconiosis.

I conducted a hearing on this claim on June 29, 2005 in Pikeville, Kentucky. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges, 29 CFR Part 18. The Claimant appeared at the hearing without counsel and was

advised of his right to counsel. TR 6. He indicated his understanding of the situation and stated his intent to proceed pro se. TR 6-8. At the hearing, Director's Exhibits ("DX") 1-38, Employer's Exhibits ("EX") 1-9 and Administrative Law Judge's Exhibits (ALJX) 1-2 were admitted into evidence without objection. Transcript ("TR") at 4, 14-16. The record was held open after the hearing to afford both parties the opportunity to submit post-hearing argument. Employer submitted a closing argument, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

PROCEDURAL HISTORY

The Claimant filed his first application for benefits on July 9, 1998. DX 1. It was denied by Administrative Law Judge Daniel Roketenetz by Decision and Order dated September 20, 2000, in which the judge found that the evidence did not establish pneumoconiosis or total disability stemming from pneumoconiosis. Claimant filed a timely appeal to the Benefits Review Board ("the Board") and on October 9, 2001, the Board issued a Decision and Order affirming the denial of benefits. In that decision, the Board affirmed the finding of fifteen years of coal mine employment and that Claimant had failed to establish the existence of pneumoconiosis. The Board found it unnecessary to consider the finding made by Judge Roketenetz regarding total disability. Claimant filed a new application on August 12, 2002; however, he subsequently indicated his intent to withdraw that application and to file a new claim at a later date. Claimant filed his application again on October 10, 2002. DX 3. The District Director of the Office of Workers' Compensation Programs ("OWCP") issued a Proposed Decision and Order denying benefits on December 16, 2003, and Claimant filed a timely appeal. DX 30, 32. This matter was then referred to the Office of Administrative Law Judges for a formal hearing. DX 37.

APPLICABLE STANDARDS

Since this claim was filed after January 19, 2001, the current regulations at 20 CFR Parts 718 and 725 apply. 20 CFR §§ 718.2 and 725.2. In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose at least in part out of his coal mine employment, that he is totally disabled, and that the pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 CFR §§ 718.1, 718.202, 718.203, and 718.204.

ISSUES

After the hearing, the following are the remaining contested issues:

1. Whether the claim was timely filed;

2. Whether the Claimant worked at least twenty years in or around or more coal mines;

3. Whether the Claimant has pneumoconiosis as defined by the Act and the regulations;

4. Whether his pneumoconiosis arose out of coal mine employment;

5. Whether he is totally disabled;

6. Whether his disability is due to pneumoconiosis;

7. Whether the named employer is the Responsible Operator;

8. Whether the named employer has secured the payment of benefits; and,

9. Whether the evidence establishes a material change in condition pursuant to 20 C.F.R. §725.309.

DX 37; Tr. 9-10.

The Employer also reserved its right to challenge the statute and regulations. These issues are beyond the authority of the administrative law judge and are preserved for appeal purposes only. TR 10.

Previously, the Board affirmed the ALJ's findings of 15 years of coal mine employment and that the named responsible operator was correctly named. Sufficient evidence was not presented to change those previous determinations. Also, evidence was not submitted to show that the claim was untimely.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and the Claimant's Testimony

The Claimant testified to the following. TR 17-24. He was born on December 3, 1950, was 54 years of age at the date of the hearing, and has no dependents. TR 17-18.

The Claimant stated that he worked in the coal mines for approximately twenty to twenty-five years. His last job was in maintenance. TR 18. His work involved greasing equipment and repairing equipment. His work was underground. TR 19. He was terminated after he was sent for a physical and found to have "bad lungs." TR 19. Claimant testified that he has a bad heart and has had open heart surgery. TR 20. The Claimant has been prescribed inhalers and a nebulizer. TR 21. He is also on heart medication. TR 22. Dr. Mian is his treating physician for his heart. TR 22.

The Claimant stated he has been smoking cigarettes for years and continues to smoke to date. TR 22. He testified that he used to smoke about a pack and a half of cigarettes a day. TR 22.

Subsequent Claim

In a subsequent claim, the threshold issue is whether one of the applicable conditions of entitlement has changed since the previous claim was denied. Claimant's first claim was denied on October 9, 2001. The instant claim was filed on October 10, 2002, not within one year of the prior denial. Therefore, I must consider the new evidence and determine whether the Claimant has proven at least one of the elements of entitlement previously decided against him. If so, then I must consider whether all of the evidence establishes that he is entitled to benefits.

The United States Court of Appeals for the Sixth Circuit, under whose jurisdiction this claim arises,[1] has articulated the standard to be followed in determining whether the requirements of Section 725.309 have been met. In the case of *Sharondale Corp. v. Ross*, 42 F. 3d 993 (6th Cir. 1994), the Court adopted the following standard for determining whether a miner has established a material change in condition:

> . . . to assess whether a material change in condition is established, the [administrative law judge] must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the [administrative law judge] must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits.

Ross at 997-998.

This standard rejects the introduction of evidence which was available at the time of the initial decision which tends to show that the initial decision was in error. The purpose of §725.309(d) is not to allow a claimant to revisit an earlier denial of benefits, but rather to show that his condition has materially changed since the earlier denial.

In applying the provision of §725.309(d) and in attempting to determine whether a material change in condition has occurred, only evidence relevant to the issues capable of change are relevant. It is necessary to evaluate only the new evidence

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[1] The Benefits Review board has held that the law of the circuit in which the Claimant's last coal mine employment occurred is controlling. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) The Claimant's last coal mine employment took place in Kentucky, which falls under the Sixth Circuit's jurisdiction.

offered to determine if the Claimant has satisfied at least one element previously adjudicated against him required in establishing entitlement.

Since the present claim was denied last on the basis that the Claimant failed to establish the existence of pneumoconiosis or total disability stemming from pneumoconiosis, I will initially determine whether the evidence submitted since 2001 now establishes either element of entitlement. If either is established, then all record evidence must be weighed to determine if the Claimant has established all elements on the merits. Otherwise, the instant claim must be denied.

Medical Evidence[2]

Chest X-rays

Chest x-rays may reveal opacities in the lungs caused by pneumoconiosis and other diseases. Larger and more numerous opacities result in greater lung impairment. The quality standards for chest x-rays and their interpretations are found at 20 CFR § 718.102 (2004) and Appendix A of Part 718. The following table summarizes the x-ray findings available in this case. The existence of pneumoconiosis may be established by chest x-rays classified as category 1, 2, 3, A, B, or C according to ILO-U/C International Classification of Radiographs. Small opacities (1, 2, or 3) (in ascending order of profusion) may be classified as round (p, q, r) or irregular (s, t, u), and may be evidence of "simple pneumoconiosis." Large opacities (greater than 1 cm) may be classified as A, B or C, in ascending order of size, and may be evidence of "complicated pneumoconiosis." A chest x-ray classified as category "0," including subcategories 0/-, 0/0, 0/1, does not constitute evidence of pneumoconiosis. 20 CFR § 718.102(b) (2004).

Physicians' qualifications appear after their names. Qualifications have been obtained where shown in the record by curriculum vitae or other representations, or if not in the record, by judicial notice of the lists of readers issued by the National Institute of Occupational Safety and Health (NIOSH).[3] If no qualifications are noted for any of the following physicians, it means that I have been unable to ascertain them either from

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[2] It is to be noted that DX 15a consists of medical evidence which does not pertain to the instant miner. It will not be considered herein.

[3] NIOSH is the federal government agency that certifies physicians for their knowledge of diagnosing pneumoconiosis by means of chest x-rays. Physicians are designated as "A" readers after completing a course in the interpretation of x-rays for pneumoconiosis. Physicians are designated as "B" readers after they have demonstrated expertise in interpreting x-rays for the existence of pneumoconiosis by passing an examination. Historical information about physician qualifications appears on the U.S. Department of Health and Human Services, List of NIOSH Approved B Readers with Inclusive Dates of Approval [as of] June 7, 2004, found at http://www.oalj.dol.gov/public/blalung/refrnc/bread3_07_04.htm. Current information about physician qualifications appears on the CDC/NIOSH, NIOSH Certified B Readers List found at http://www2a.cdc.gov/drds/breaders/breaders_results.asp.

the record or the NIOSH list. Qualifications of physicians are abbreviated as follows: A= NIOSH certified A reader; B= NIOSH certified B reader; BCR= board-certified in radiology. Readers who are board-certified radiologists and/or B readers are classified as the most qualified. See *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 145 n. 16 (1987); *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276 n.2 (7th Cir. 1993). B readers need not be radiologists.

Date of X-ray	Readers' Qualifications (all are doctors)	Film Quality	Result Concerning Presence of Pneumoconiosis
EX 3 1/16/03	Rosenberg, B	ILO Classification Quality 1	No pneumo
DX11 1/29/03	Barrett, B BCR	ILO Classification Quality 1	Quality reading only
DX 11 1/29/03	Hussain	ILO Classification Quality 1	No pneumo
DX 14 1/29/03	Wiot, B BCR	ILO Classification Quality 2	No pneumo
EX 1 6/17/04	Rosenberg, B	ILO Classification Quality 1	0/0

Several x-ray readings which make no mention of coal workers' pneumoconiosis have been submitted. DX 13. They cannot assist the Claimant in establishing the existence of the disease.

Medical Opinions

A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in 20 CFR § 718.201. See 20 CFR § 718.202(a)(4). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 CFR § 718.202(a)(4).

Quality standards for reports of physical examinations are found at 20 CFR § 718.104. The record contains the following medical opinions relating to this case.

Dr. Imtiaz Hussain (Examination on behalf of OWCP)

Dr. Imtiaz Hussain examined Claimant on January 29, 2003. DX 11. Dr. Hussain listed twenty-five years of coal mine employment and a cigarette smoking history of half a pack per day, Claimant having started smoking ten to eleven years ago. Claimant's chief complaints were sputum, wheezing, dyspnea and cough. Dr. Hussain took

occupational, social, family and medical histories, and conducted a physical examination. Based upon his examination, which included the taking of a chest x-ray, pulmonary function study, blood gas testing and EKG, Dr. Hussain diagnosed coronary artery disease and chronic bronchitis due to tobacco abuse. He found no pulmonary impairment to be present. Dr. Hussain is board certified in internal medicine and pulmonary diseases.

Dr. David M. Rosenberg (Examination on behalf of Employer)

For the Employer, Dr. David M. Rosenberg examined the Claimant on June 17, 2004 and provided a medical report dated June 29, 2004. EX 1. Dr. Rosenberg is board-certified in internal medicine, pulmonary disease and occupational medicine. He took occupational, social, family and medical histories, and conducted a physical examination, chest x-ray, blood gas studies and pulmonary function testing. He also reviewed his prior examination of Claimant conducted on January 16, 2003. Dr. Rosenberg recorded a smoking history of half a pack of cigarettes per day from the age of 21 or 22 years to the present time. Dr. Rosenberg noted that Claimant stopped smoking four months ago. Based upon his examinations, Dr. Rosenberg concluded that Claimant did not have coal workers' pneumoconiosis or associated pulmonary impairment.

By report dated May 23, 2005, Dr. Rosenberg stated that he had reviewed medical evidence in this case. EX 2. His review did not alter his conclusion that Claimant did not have clinical or legal coal workers' pneumoconiosis. In his deposition testimony taken on June 13, 2005, Dr. Rosenberg reiterated his opinion as noted above. EX 4.

Bruce C. Broudy (Review on behalf of Employer)

Dr. Bruce C. Broudy reviewed the medical evidence of record, and was deposed on June 20, 2005. EX 7. Dr. Broudy is board-certified in internal medicine and pulmonary disease. Dr. Broudy reviewed the medical evidence including the report of Dr. Hussain, his own examinations from 1998 and 1999 and the records from Dr. Fino and chest x-ray readings. Based upon his review, Dr. Broudy opined that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis.

In his May 6, 2005 medical report, Dr. Broudy stated that there was no evidence of any impairment arising from inhalation of coal mine dust. There was no evidence of any disabling impairment due to any cause. If there was any impairment, it was due to cigarette smoking. EX 5.

In a subsequent letter dated May 26, 2005, Dr. Broudy stated that he had received a copy of the report of Dr. Rosenberg dated June 17, 2004. EX 6. His opinion did not change.

Treatment Records

Treatment records from Drs. Ghazala Quddus and Asad Majid have been submitted. DX 13. These include x-ray reports and the results of a cardiolite stress test conducted since the prior denial, as well as treatment records predating the prior denial. None of the records which date after the prior denial render a diagnosis of coal workers' pneumoconiosis. There is mention of COPD.

DISCUSSION AND APPLICABLE LAW

Existence of Pneumoconiosis

The regulations define pneumoconiosis broadly:

> (a) For the purpose of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical", pneumoconiosis and statutory, or "legal", pneumoconiosis.
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> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silico-tuberculosis, arising out of coal mine employment.
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> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
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> (b) For purposes of this section, a disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.
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> (c) For purposes of this definition, "pneumoconiosis" is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 CFR § 718.201.

20 CFR § 718.202(a) provides that a finding of the existence of pneumoconiosis may be based on evidence from a (1) chest x-ray, (2) biopsy or autopsy, (3) application

of the presumptions (not applicable here) described in Sections 718.304, 718.305, or 718.306, or (4) a physician exercising sound medical judgment based on objective medical evidence and supported by a reasoned medical opinion. There is no autopsy or biopsy evidence of record and the presumptions set forth above do not apply in this case. In order to determine whether the evidence establishes the existence of pneumoconiosis, I must consider the chest x-rays and medical opinions – the two categories of evidence applicable in this case.

Pneumoconiosis is a progressive and irreversible disease. *Woodward v. Director, OWCP*, 991 F.2d 314, 320 (6th Cir. 1993). As a general rule, therefore, more weight is given to the most recent evidence. See *Mullins Coal Co. of Virginia v. Director, OWCP*, 484 U.S. 135, 151-152 (1987); *Eastern Associated Coal Corp. v. Director, OWCP*, 220 F.3d 250, 258-259 (4th Cir. 2000); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 1167 (6th Cir. 1997); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 602 (3rd Cir. 1989); *Stanford v. Director, OWCP*, 7 B.L.R. 1-541, 1-543 (1984); *Tokarcik v. Consolidated Coal Co.*, 6 B.L.R. 1-666, 1-668 (1983); *Call v. Director, OWCP*, 2 B.L.R. 1-146, 1-148-1-149 (1979). This rule is not to be mechanically applied to require that later evidence be accepted over earlier evidence. *Woodward*, 991 F.2d at 319-320; *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992); *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-600 (1984).

Of the newly submitted x-rays in this case which were read for the purposes of classifying pneumoconiosis, none was found to be positive for pneumoconiosis. Accordingly, I do not find the x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).

Analysis of Medical Opinions

Medical Opinion Guidance

I must next consider the medical opinions. The Claimant can establish that he suffers from pneumoconiosis by well-reasoned, well-documented medical reports. A "documented" opinion is one that sets forth the clinical findings, observations, facts, and other data upon which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19, 1-22 (1987). An opinion may be adequately documented if it is based on items such as a physical examination, symptoms, and the patient's work and social histories. *Hoffman v. B&G Construction Co.*, 8 B.L.R. 1-65, 1-66 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295, 1-296 (1984); *Justus v. Director, OWCP*, 6 B.L.R. 1-1127, 1-1129 (1984). A "reasoned" opinion is one in which the judge finds the underlying documentation and data adequate to support the physician's conclusions. *Fields*, above. Whether a medical report is sufficiently documented and reasoned is for the judge to decide as the finder-of-fact; an unreasoned or undocumented opinion may be given little or no weight. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149, 1-155 (1989) (en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1291, 1-1294 (1984). A physician's report may be rejected where the basis for the physician's opinion cannot be determined. *Cosaltar v.*

Mathies Coal Co., 6 B.L.R. 1-1182, 1-1184 (1984). An opinion may be given little weight if it is equivocal or vague. *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187 (6th Cir. 1995); *Justice v. Island Creek Coal Co*., 11 B.L.R. 1-91, 1-94 (1988); *Parsons v. Black Diamond Coal Co.*, 7 B.L.R. 1-236, 1-239 (1984).

In the instant case, the Claimant has not met his burden of proof to show – by medical opinion evidence – that he has pneumoconiosis. None of the newly submitted medical reports find the Claimant to be suffering from coal workers' pneumoconiosis. While there is mention of chronic bronchitis, Dr. Hussain finds the etiology of same to be tobacco abuse. Similarly, while the treatment records indicate COPD, no physician attributes that condition to coal mine employment. Absent a well-reasoned, well-documented medical opinion establishing the existence of pneumoconiosis, Claimant cannot establish the existence of the disease pursuant to 20 C.F.R. §718.202(a)(4). This being the case, the Claimant has failed to establish the existence of pneumoconiosis pursuant to any of the means provided in §718.202(a). Accordingly, he has failed to establish that this element previously adjudicated against him has been established.

In addition, all three medical opinions -- include the Department of Labor opinion -- state and support the finding that the Claimant is not disabled or totally disabled. If the Claimant has any impairment, it is due to his lengthy period of cigarette smoking.

Since the Claimant has not submitted evidence to establish either element previously adjudicated against him, benefits must be denied.

FINDINGS AND CONCLUSIONS REGARDING ENTITLEMENT TO BENEFITS

Because the Claimant has failed to meet his burden to establish that he has pneumoconiosis or is totally disabled due to pneumoconiosis, he has failed to establish a change in condition, and he is not entitled to benefits under the Act.

ATTORNEY FEES

The award of an attorney's fee under the Act is permitted only in cases in which the claimant is found to be entitled to benefits. See Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 928, as incorporated into the Black Lung Benefits Act, 30 U.S.C. § 932. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to him in pursuit of this claim.

ORDER

The claim for benefits filed by the Claimant on October 10, 2002, is hereby DENIED.

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WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:dj

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).